

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

RYAN BURNS, on behalf of himself
and all others similarly
situated,

Plaintiff,

v.

GERBER PRODUCTS COMPANY d/b/a
NESTLE INFANT NUTRITION, and
NESTLE USA, INC.,

Defendants.

No. CV-12-5027-EFS

**ORDER GRANTING DEFENDANT'S MOTION
TO TRANSFER, TRANSFERRING CASE TO
THE DISTRICT OF NEW JERSEY, AND
CLOSING FILE**

I. INTRODUCTION

This matter comes before the Court on Defendants Gerber Products Company and Nestlé USA, Inc.'s (collectively, "Defendants") Motion to Transfer, ECF No. 33. Defendants Gerber Products Company ("Gerber") and Nestlé USA ("Nestlé") ask the Court to transfer this case, pursuant to 28 U.S.C. § 1404(a), to the District of New Jersey, where a consolidated class-action suit asserting near-identical claims is currently pending. The Court heard telephonic argument on the motion on February 5, 2013. Jack Fitzgerald appeared and argued on behalf of Plaintiff. Dale Joseph Giali appeared and argued on behalf of Defendants. Having reviewed the parties' submissions and the applicable authority, and being fully informed, the Court orally

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1 granted Defendant's motion at the hearing. This Order memorializes
2 and supplements the Court's oral ruling.

3 **II. BACKGROUND**

4 This case is one of ten near-identical false advertising class
5 actions filed against Gerber and Nestlé between February 2012 and
6 April 2012 in various district courts throughout the country. At
7 least five of the ten suits have been consolidated in the District of
8 New Jersey as *In re Gerber Probiotic Sales Practices Litigation*, Civ.
9 No. 12-835 (JLL) (CLW) (D.N.J. 2012) ("*In re Gerber*"), including the
10 first-filed *Siddiqi* case, which was transferred from the Central
11 District of California to the District of New Jersey. Four other
12 cases remain in California. Each of the ten suits was filed by one of
13 three groups of plaintiffs' counsel: the Weston Firm (California), the
14 Law Offices of Ronald A. Marron (California), and Carella, Byrne,
15 Cecchi, Olstein, Brody & Agnello (New Jersey). The Weston Firm,
16 counsel to Plaintiff in this instant case, is also counsel of record
17 in two of the pending California suits.

18 On June 27, 2012, Defendants filed a Motion to Dismiss or, in
19 the Alternative, to Transfer, ECF No. 13. While that motion was
20 pending, on August 3, 2012, Plaintiff filed a Motion to Stay Pending
21 Resolution of MDL Motion to Transfer, ECF No. 20. Plaintiff asked
22 this Court to stay proceedings in this suit while his motion for
23 consolidation was pending before the Judicial Panel on Multi-District
24 Litigation ("MDL Panel"). On September 4, 2012, following a hearing
25 on the parties' motions, the Court denied in part and held in abeyance
26 in part Defendants' motion, finding that dismissal was not warranted

1 but deferring judgment on the issue of transfer until the MDL Panel
2 had resolved Plaintiff's consolidation motion. ECF No. 27. The Court
3 granted Plaintiff's motion to stay. *Id.* On October 16, 2012, the MDL
4 Panel denied Plaintiff's motion to consolidate. ECF No. 28.

5 With the Court's leave, Plaintiff filed an amended complaint,
6 asserting only Washington state-law claims on behalf of a putative
7 class of Washington consumers. ECF No. 32. Defendants again seek
8 transfer to the District of New Jersey for consolidation with *In re*
9 *Gerber*.

10 **III. DISCUSSION**

11 **A. Legal Standard**

12 A district court may transfer a civil action to another district
13 where it might have been brought "[f]or the convenience of parties and
14 witnesses [and] in the interest of justice[.]" 28 U.S.C. § 1404(a).
15 Transfer is warranted "to prevent the waste of time, energy and money
16 and to protect litigants, witnesses and the public against unnecessary
17 inconvenience and expense." *Van Dusen v. Barrack*, 376 U.S. 612, 616
18 (1964) (internal quotations omitted). Courts are "to adjudicate
19 motions for transfer according to an individualized, case-by-case
20 consideration of convenience and fairness." *Stewart Org. v. Ricoh*
21 *Corp.*, 487 U.S. 22, 29 (1988) (internal quotations omitted). Some
22 factors the Court may consider in evaluating a motion to transfer
23 under § 1404(a) include:

24 (1) the location where the relevant agreements were
25 negotiated and executed, (2) the state that is most
26 familiar with the governing law, (3) the plaintiff's choice
of forum, (4) the respective parties' contacts with the
forum, (5) the contacts relating to the plaintiff's cause

1 of action in the chosen forum, (6) the differences in the
2 costs of litigation in the two forums, (7) the availability
3 of compulsory process to compel attendance of unwilling
non-party witnesses, and (8) the ease of access to sources
of proof.

4 *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498-99 (9th Cir. 2000)
5 (citing *Stewart Org.*, 487 U.S. at 29). Transfer under § 1404(a) lies
6 soundly within the discretion of the trial court. *Decker Coal Co. v.*
7 *Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986).

8 **B. Analysis**

9 The MDL Panel initially denied consolidation under 28 U.S.C. §
10 1407, finding instead that "where a reasonable prospect exists that
11 resolution of [§] 1404 motions could eliminate the multidistrict
12 character of a litigation, transfer under [§] 1404 is preferable."
13 MDL Order Denying Transfer, ECF No. 28, at 3. Although the MDL Panel
14 has hinted that it expects the various district courts to transfer all
15 of the Gerber cases to New Jersey, the panel has indicated a
16 willingness to revisit consolidation if the cases are not transferred:

17 We are sympathetic to the concern expressed by the
18 defendants at the hearing session that, if any of their
19 motions to transfer are denied, they may find themselves
20 litigating actions on opposite ends of the country
21 involving duplicative discovery and warring plaintiffs'
counsel. Should that occur, the parties may file another
[§] 1407 motion, and the Panel will revisit the question of
centralization at that time.

22 ECF No. 28, at 4.

23 As Defendants correctly observe, this transfer motion is unlike
24 the typical binary "either-or" transfer motion, because the
25 consolidated *In re Gerber* action will continue in New Jersey
26 regardless of the outcome of this transfer motion. Thus, the Court

1 cannot simply weigh the benefits and costs of Washington versus New
2 Jersey as the forum for Plaintiff's case; instead, the question is
3 whether this suit should be consolidated with *In re Gerber* in New
4 Jersey, or whether it should proceed simultaneously - and separately -
5 in Washington.

6 Each of the *Jones* transfer factors is analyzed below. But the
7 Court is also mindful that while the *Jones* factors may guide the Court
8 in determining whether transfer is warranted, those factors must also
9 be weighed against another, potentially dispositive factor: the
10 significant, unnecessary - and ultimately avoidable - burden on
11 limited judicial resources if transfer is denied. "Concerns over
12 judicial efficiency are *paramount* in situations such as this."
13 *Johansson v. Cent. Garden & Pet Co.*, No C 10-03771 MEJ, 2010 WL
14 4977725, at *3 (N.D. Cal. Dec. 2, 2010) (citing *Stein v. Immelt*, No.
15 3:09-CV-808 (RNC), 2010 WL 598925, at *2 (D. Conn. Feb. 18, 2010)
16 (emphasis added)).

17 1. Crux of the Case

18 In this case, no agreement was directly negotiated or executed
19 between the parties; thus, in assessing the first *Jones* factor - "the
20 location where the relevant agreements were negotiated and executed,"
21 *Jones*, 211 F.3d at 498 - the proper question is instead where the
22 "crux of the case" lies. See *Jovel v. i-Health, Inc.*, No. CV 12-05526
23 DDP (JCGx), 2012 WL 5470057, at *6 (C.D. Cal. Nov. 8, 2012)
24 (evaluating where the crux of the case lies, regardless of where the
25 underlying purchase of consumer goods occurred). In *Jovel*, a similar
26 false-advertising class-action, the court found that a plaintiff's

1 purchase of a product in her home district carried "little weight" in
2 determining proper venue. *Id.* Instead, the Court concluded that "the
3 crux of the case lies not in [plaintiff's] act of purchasing the
4 product . . . but instead in issue of the alleged misrepresentations .
5 . . ." *Id.*; see also *Rikos v. Procter & Gamble Co.*, No. 10CV1974 BEN
6 (CAB), 2011 WL 1456096, at *2 (S.D. Cal. Apr. 13, 2011) (finding that
7 the "operative facts" in a false-advertising class action occurred in
8 defendant's preferred forum because defendant was headquartered and
9 made decisions regarding product marketing in that forum).

10 Thus, the crux of the present case is not Washington, the state
11 where Plaintiff purports to have purchased a falsely advertised
12 product, but rather New Jersey, the state where Gerber is
13 headquartered and allegedly issued misrepresentations concerning its
14 products. The primary focus of this action is the development and
15 marketing of certain Gerber consumer goods, and decisions about how
16 such goods were to be advertised to consumers.¹ This factor therefore
17 weighs in favor of transfer to New Jersey.

18 2. Familiarity with Governing Law

19 Another factor the Court must consider in weighing a transfer is
20 which court is most familiar with the applicable governing law.
21 *Jones*, 211 F.3d at 498. In his amended complaint, Plaintiff asserts
22 only Washington state-law claims. Accordingly, it might appear that
23 "this Court is in a better position to decide the claims under
24

25 ¹ Gerber alleges - and Plaintiff does not dispute - that Nestlé will
26 play little, if any, substantive role in this litigation.

1 Washington [law]" than the New Jersey court would be. *Pac. Coast*
2 *Trailers, LLC v. Cozad Trailer Sales, LLC*, No. CV-10-0111-EFS, 2010 WL
3 2985701, at *2 (E.D. Wash. July 21, 2010); accord *In re Ferrero*
4 *Litig.*, 768 F. Supp. 2d 1074, 1081 (S.D. Cal. 2011) (reaching the same
5 conclusion for claims asserted under California law). However,
6 federal courts routinely and competently apply the laws of other
7 states. And importantly, the Washington laws at issue in this case
8 are "not especially complex or specialized"; it seems likely that
9 "[t]he resolution of this action will depend less on expertise in
10 [Washington] law and more on the court's fact-finding function."
11 *Barnstormers, Inc. v. Wing Walkers, LLC*, No.09CV2367 BEN (RBB), 2010
12 WL 2754249, at *3 (S.D. Cal. July 9, 2010). This factor is neutral.

13 3. Plaintiff's Choice of Forum

14 Ordinarily, a plaintiff's choice of forum is generally accorded
15 "great weight," *Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987),
16 and is not disturbed except on a "strong showing of inconvenience,"
17 *Decker Coal*, 805 F.2d at 843. However, "when an individual . . .
18 represents a class, the named plaintiff's choice of forum is given
19 less weight." *Lou*, 834 F.2d at 739. In judging the weight to give a
20 class-action plaintiff's choice of forum, the Court weighs the extent
21 of the plaintiff's contacts with the forum. *Id.* Here, Plaintiff
22 resides in Washington, and all putative class members purchased the
23 allegedly misadvertised products in Washington. Thus, Plaintiff's
24 choice to bring suit in Washington is afforded substantial weight, and
25 this factor counsels against transfer.

26 //

1 Moreover, during the hearing on this motion, Plaintiff's counsel
2 expressed concern that if this Court ordered consolidation with *In re*
3 *Gerber*, either Plaintiff Ryan Burns - as the putative class
4 representative for Washington consumers - or the Washington state-law
5 claims might be omitted from the consolidated litigation. Although
6 the Court is concerned about this possibility, the Court considers it
7 an unlikely outcome. The Court is confident that the presiding
8 judicial officer in *In re Gerber* will preserve the Washington state-
9 law claims and Washington subclass to ensure no putative Washington
10 plaintiff in this action is denied the right to pursue their chosen
11 cause of action.

12 4. Parties' Contacts with Washington and New Jersey

13 The parties' contacts with the two potential venues for this
14 suit also bear on the transfer analysis. Although this factor
15 overlaps somewhat with the "crux of the case" factor above, the Court
16 must consider the extent of each party's contacts with each forum, not
17 just where the gravamens of the case lies. Plaintiff lives and works
18 in Washington, and he allegedly purchased misadvertised products in
19 this forum. Although Gerber's contacts with Washington are not nearly
20 as substantial, they are not *de minimis*: Gerber markets and sells its
21 products in Washington to residents of this state, and it collects
22 revenue from the citizens of this state. In contrast, in New Jersey,
23 the parties' positions are reversed: Plaintiff apparently has no
24 contact with New Jersey (at least, relevant to this lawsuit), whereas
25 Gerber's contacts are systematic and extensive. In addition to the
26 fact that Gerber is headquartered in New Jersey, Gerber's

1 manufacturing and marketing employees are presumably located in New
2 Jersey, and decisions related to the marketing of Gerber's products
3 are made in New Jersey. On balance, because both parties have
4 contacts with Washington but only Gerber has contacts with New Jersey,
5 this factor weighs against transfer to New Jersey.

6 5. Costs of Litigation

7 Because *In re Gerber* will proceed regardless of whether this
8 case is transferred, there will only be a marginal, if any, cost
9 associated with consolidating this case with *In re Gerber*. On the
10 other hand, if the Court were to deny transfer, the overall cost of
11 litigation will be effectively doubled because both suits will proceed
12 independently – and possibly with different Plaintiff's counsel. In
13 light of the cost savings that will occur if this case is consolidated
14 in New Jersey, this factor weighs heavily in favor of transfer.

15 6. Availability of Compulsory Process

16 A party may compel the testimony of its employees at trial.
17 *STX, Inc. v. Trik Stik, Inc.*, 708 F. Supp. 1551, 1556 (N.D. Cal.
18 1988). However, for non-party witnesses, the Court's subpoena power
19 extends to anywhere within the district and one hundred miles of the
20 place of trial. Fed. R. Civ. P. 45(b)(2). For these reasons,
21 convenience of third-party witnesses is generally a more important
22 consideration than that of party witnesses. *In re Ferrero Litig.*, 768
23 F. Supp. 2d at 1080.

24 Neither party has yet identified any potential non-party
25 witnesses. Defendants assert that most of their witnesses are
26 "presumably located in New Jersey," and Plaintiff contends that he

1 expects expert witnesses from around the country to participate.
2 Thus, in the absence of specificity as to potential third-party
3 witnesses, this factor is neutral.

4 7. Access to Evidence; Convenience of the Parties & Witnesses

5 Because most documentary evidence can now be produced
6 electronically, absent some unique and presently-unknown difficulty,
7 the documentary evidence in this case is not likely to create a
8 greater or lesser burden depending on whether this matter proceeds in
9 Washington or in New Jersey. Thus, access to sources of proof is a
10 neutral factor.

11 As to party witnesses, Gerber suggests that most of its
12 manufacturing and marketing employees who would offer relevant
13 testimony are likely located in New Jersey, although at this stage of
14 the litigation, the extent of the potential witness list and the
15 locations of those witnesses is largely unknown. Plaintiff, on the
16 other hand, contends that because he lives in Washington, he would
17 bear a disproportionate expense if he had to travel and stay in New
18 Jersey to participate in this matter. Plaintiff argues that
19 Defendants, as corporate entities, are better able to shoulder costs
20 of travel than Plaintiffs. However, as a named plaintiff in a class-
21 action suit, Plaintiff has little reason to travel to New Jersey: if
22 his deposition is required, that deposition will be conducted in
23 Washington. Fed. R. Civ. P. 45(a)(2)(B), (b)(2)(B). No party
24 witnesses in Washington, other than Plaintiff, have been identified.

25 Alternatively, Plaintiff argues that the convenience of party
26 witnesses is not a factor warranting consideration, and that instead,

1 the Court should only consider the convenience of non-party witnesses,
2 such as experts. It is true that "the convenience of key witnesses
3 who are employees of the defendant requesting transfer is entitled to
4 less weight" than the convenience of non-party witnesses. *Hartfield*
5 *v. Offshore Oil Servs., Inc.*, Civ. No. G-06-275, 2006 WL 2670984, at
6 *6 (S.D. Tex. Sept. 14, 2006) (internal quotation omitted). But the
7 convenience of party witnesses "is still a factor this Court may
8 consider," *Rikos*, 2011 WL 1456096, at *2, and it favors transfer.

9 As to non-party witnesses, neither Plaintiff nor Defendants have
10 specifically identified any. Accepting as true Plaintiff's contention
11 that most non-party witnesses are likely to be experts, if the Court
12 declined to transfer this matter, those experts would presumably have
13 to travel twice: to New Jersey, for *In re Gerber* depositions, and to
14 Washington, for *Burns* depositions. Duplicative travel would also be
15 required should both matters proceed to trial. There has been no
16 showing that New Jersey is a less convenient forum for non-party
17 witnesses than Washington, and indeed, common sense suggests that it
18 is more convenient to consolidate all witness participation in one
19 forum and to reduce unnecessary travel. Accordingly, this factor also
20 favors transfer.

21 Finally, New Jersey is plainly the more convenient forum for
22 counsel. Plaintiff's counsel hails from San Diego; and while the
23 travel costs from California to New Jersey might be slightly higher
24 than the costs of travel from California to Washington, they are not
25 disproportionately so. On the other hand, defense counsel will
26 already be present in (or will be required to travel to) New Jersey to

1 participate in *In re Gerber*. If this case were not transferred,
2 defense counsel would be also be required to travel to Washington for
3 proceedings in this matter. Thus, this factor too favors transfer.

4 **IV. CONCLUSION**

5 On balance, most of the *Jones* factors favor transfer.
6 Plaintiff's choice of forum, and the extent of the parties' contacts
7 with Washington, weigh against transfer. However, the crux of the
8 case belongs in New Jersey; further, the convenience of the parties,
9 witnesses, and counsel, as well as the costs of litigation weigh just
10 as strongly – if not more so – in favor of transfer. But ultimately,
11 Plaintiffs have not presented a compelling case sufficient to overcome
12 the "paramount" factor weighing in favor of transfer: judicial economy
13 and the conservation of limited judicial resources. *Johansson*, 2010
14 WL 4977725, at *3. Transfer is plainly warranted.

15 Accordingly, **IT IS HEREBY ORDERED:**

- 16 1. Defendant's Motion to Transfer, **ECF No. 33**, is **GRANTED**.
17 2. This matter is hereby **TRANSFERRED** to the United States
18 District Court for the District of New Jersey for all
19 subsequent proceedings.
20 3. The Clerk's Office is directed to **CLOSE** this file.

21 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this
22 Order and provide copies to all counsel.

23 **DATED** this 12th day of February 2013.

24 s/ Edward F. Shea
25 _____
EDWARD F. SHEA
26 Senior United States District Judge